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IN THE

Supreme Court of The United States

OCTOBER TERM, 1968

No. 694

ROBERT M. PAGANO, *Petitioner,*

v.

SAMUEL A. MARTIN and
HOWARD E. MINITER, JR., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Robert M. Pagano, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above styled case on July 1, 1968.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the Honorable Richard B. Kellam, of the United States District Court for the Eastern District of Virginia, Norfolk Division, is reported at 275 F. Supp. 498 (1967) and is printed in Appendix hereto. The Court of Appeals for the Fourth Circuit affirmed the order of the District Court in a *per curiam* opinion which is reported at 397 F. 2d 620

(Advance Report No. 3) and is printed in Appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on July 1, 1968. On September 22, 1968, petitioner made application to this Court for an extension of time within which to file this petition for a writ of certiorari. This application was granted on September 23, 1968, extending the time for filing this petition to and including October 29, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. Sections 1254(1) and 2101(c).

QUESTIONS PRESENTED

1. Whether the judicially developed doctrine of official immunity enunciated by the Court in *Barr* v. *Matteo* was meant to cover false, malicious and defamatory writings deliberately made without probable cause.

2. Whether there is or should be an unqualified or absolute privilege for acts committed by naval officers beyond their jurisdiction and authority, without probable cause, malicious, not really in the exercise of military authority, but are for some unknown, hidden and improper purpose.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The principal statutory and regulatory provisions involved are United States Navy Regulations, 1948, Articles, 0701(2), 1201(1), 1201(2), 1202, 1211(1) and 1319; Bureau of Naval Personnel Manual, 1959, Section C-7821(8)(b)(1); and Title 10, U.S.C. Sections 5131

and 5132. The relevant portions of these provisions as are applicable to this cause are set forth in the petition where referred to in the argument.

STATEMENT OF THE CASE

This petition for a writ of certiorari requests the Court to bring up for review a judgment and *per curiam* opinion of the Court of Appeals for the Fourth Circuit affirming (1) an order of the District Court dismissing the petitioner's cause of action for money damages and (2) an order of the District Court granting respondents' motion for summary judgment upon the grounds of absolute privilege, federal court jurisdiction having been obtained upon the grounds of diversity of citizenship.

STATEMENT OF FACTS

Petitioner, Robert M. Pagano, was, for 9½ years and is, a Radarman by profession, who by his conduct, industry and ability attained the rank of first class petty officer, a pay grade of E-6 in the U. S. Navy, and that he had depended upon his continued enlistment and reenlistment and advancement in the Navy leading up to eventual retirement as support for himself and family.

That on or about September 27, 1966, the plaintiff reported aboard the U. S. S. Robert A. Owens for duty.

That co-respondent, Samuel A. Martin, was the commanding officer of the Owens with the rank of commander and co-respondent Howard E. Miniter, Jr., was the executive officer of the Owens with the rank of lieutenant-commander.

That on December 9, 1966, in accordance with the standards and instructions of the Bureau of Naval Personnel Manual, the respondents certified that the petitioner fulfilled the prescribed requirements and was in all respects qualified, and did recommend him for advancement and nominated him in all respects for participation in the Navy-wide competitive examination for Chief Radarman, said certification being effective up to and including May 16, 1967, as shown by Exhibit "A" (R. Vol. I. 6) and Exhibit "D" (R. Vol. I. 9).

That on December 12, 1966, he was granted ten (10) days annual leave effective December 27, 1966 and expiring January 7, 1967. (R. Vol. I. 10)

That on December 16, 1966, in accordance with the instructions of C-7821 (8) (a) Bureau of Naval Personnel Manual, the respondents did submit the petitioner's Enlisted Performance Evaluation (R. Vol. I. 7) wherein they graded him as follows:

Professional Performance	3.8
Military Behavior	3.6
Leadership & Supervisory Ability	3.8
Military Appearance	3.8
Adaptability	3.8

and the respondents did further make the following comments of and concerning the petitioner's performance and ability:

> "Pagano has shown himself to be a competent radarman and an excellent petty officer by his extremely effective and reliable professional performance. He expresses himself well and with much authority." (R. Vol. I. 7)

That between December 17, 1966 and February 2, 1967, the petitioner was on board the U. S. S. Robert A. Owens in an official duty status the six (6) specific days of December 19, 20, 21, 22, 23 and 26, 1966. All other days petitioner was either on authorized leave or on his week-end liberty.

In accordance with Section C-7821(8)(a) Bureau of Naval Personnel Manual, the petitioner's next reporting period, the conclusion of which another Enlisted Performance Evaluation would be submitted on him began on December 17, 1966 and ended on June 16, 1967.

On December 27, 1966, the petitioner departed on his ten (10) days annual leave and returned to the ship on January 7, 1967, prior to the expiration of said leave. (R. Vol. I. 10)

After returning to the Owens on January 7, 1967, petitioner then went on week-end liberty returning to the ship on January 9, 1967.

On January 9, 1967, the petitioner was granted ten (10) days emergency leave beginning 1200 January 9, 1967 and expiring at 0730 January 20, 1967, at which time he was to report to the authorities at the Naval Station, Norfolk, Virginia. (R. Vol. I. 11, 12)

On January 9, 1967, when the petitioner departed from the Owens on emergency leave, the respondents still certified that he was in all respects qualified and fulfilled the prescribed requirements, and did recommend him for advancement and nominated him in all respects for participation in the Navy-wide competitive examination for Chief Radarman by submitting to the Naval Examination Center, the petitioner's NAVPERS

624 CARD which was the petitioner's authority to be admitted to the examination center to take the examination. (Exhibit "A", R. Vol. I. 6)

On January 17, 1967, the authorities at the Naval Station contacted the respondents concerning the petitioner by radio dispatch as follows:

> "WIFE STILL IN HOSP. TO BE OPERATED ON 18 JAN. PAGANO REQUESTS TEN DAY EXTENSION EMERG LV TO EXPIRE ON BD NAVSTA NORVA 0730 30 JAN 67. LEAVE ADDRESS, 3001 VIRGINIA BEACH BOULEVARD, VIRGINIA BEACH, VIRGINIA. ZIP CODE 23452.
>
> PAGANO ADVISES ORDERS ON BD SHIP FOR TRF IN MARCH TEMDU UNDER INSTRUCTION NAVAL SCHOOL/ INSTRUCTOR LEADERSHIP NAVSERVSCOLCOM SAN DIEGO, IF CONSIDERED FEASIBLE BY SHIP. RECMD ORDERS, SERVPAHEL BE AIRMAILED THIS COMD FOR EXECUTION TO SAVE GOVT TRANSPORTATION EXPENSE TO AND FROM MED. PAGANO HAS ALL PERSONAL EFFECTS." (Exhibit "H", R. Vol. I. 13)

On January 18, 1967, the respondents refused the request for delivery of the petitioner's orders, even though petitioner's relief was on board the Owens and had been there since December, 1966, and respondents replied to the message as follows:

> "RECOMMENDATION CONCERNING MODIFICATION OF ORDERS NOT FEAS-

IBLE IN THAT FURTHER DEGRADATION OF PRESENT RD MANNING UNACCEPTABLE, RETURN OF PAGANO OR SUITABLE REPLACEMENT ASAP ESSENTIAL TO EXTENDED OPERATIONS COST OF TRANSPORTATION NOT WITHSTANDING."
(Exhibit "J", R. Vol. I. 33)

However, the superior officers of the respondents took exception to the action they had taken in refusing to deliver the orders of petitioner and issued their own orders to the respondents via radio dispatch from COMCRUDESLANT as follows:

"COMCRUDESLANT TAKES REF A FORAC. RTN OF RDI PAGANO ON GOVT FUNDS REQ. REF B NOT ECONOMICAL NOR APPROPRIATE IN VIEW OF ULTIMATE TRANS IN MAR IAW REF C. CURRENT RD MANNING IN EXCESS FORCE PERCENTAGE BY ONE RDC.

FWD SERANDA TO NAVSTA NORVA."
(Exhibit "K", R. Vol. I. 34)

The petitioner's service records referred to in the various radio messages did not arrive in the Naval Station in response to the Orders of COMCRUDESLANT on January 21, 1967, and on February 10, 1967, the Naval Station again requested his services records in accordance with the Orders of Comcrudeslant (R. Vol. I. 36) and the respondents replied by radio message on February 11, 1967 that the records had been sent.

The petitioner's records arrived either the 13th or

14th of February, 1967, the exact date being unknown as the envelope in which they were sent has been lost.

However, when the petitioner's records did arrive, it was then for the first time, that under the date of February 2, 1967, the respondents had submitted an Enlisted Performance Evaluation on him covering the period of December 17, 1966 to February 2, 1967, *when during this period of time, petitioner was only on the ship six (6) days, and that after January 9, 1967, the petitioner remained in the United States and the respondents were on their way to the Mediterranean Sea.* (Emphasis added)

In this report (Exhibits "C" & "D", R. Vol. I. 8, 9), the respondents made the following numerical evaluations:

Professional Performance	3.0
Military Behavior	3.2
Leadership & Supervisory Ability	2.6
Military Appearance	3.0
Adaptability	2.6

based upon the following false facts and defamatory statements deliberately made by the respondents of and concerning the petitioner.

> "In his short tour of duty aboard this ship Pagano quite often failed to demonstrate the qualities of leadership expected of a first class petty officer. He aired his complaints about this command's policies in front of his subordinates whenever he felt he had been treated unfairly. Petty Officer Pagano possesses a great amount of energy, and when this energy was channeled to serve this command the results were satisfactory, but too often

he diverted his efforts toward getting his own way. On at least one occasion he broke the chain of command to register a complaint. On occasion he raised undue objections to orders given him as he felt his way of doing things was better. His professional performance attitude and capabliities were extremely marginal and in general of the E-4 level. His attitude was in general bad for morale. He is not recommended for reenlistment in the future." (Exhibit "C", R. Vol. I. 8)

"2 FEB 67: Assigned mark of 2.6 in Leadership and Supervisory Ability due to failure to demonstrate the qualities of leadership expected of a first class petty officer.

Assigned mark of 2.6 in Adaptability due to the fact that he was in general bad for morale."

"2 FEB 67: Recommendation for advancement to RDC dated 9 December 1966 withdrawn this date due to low evaluation mark in professional performance." (Exhibit "D", R. Vol. I. 9)

REASONS FOR GRANTING THE WRIT

I. The decision below is unjust, unreasonable and plainly wrong as to (A) Summary Judgment and (B) Immunity Doctrine, under the facts of this case.

The Decision Below Is Unjust, Unreasonable and Plainly Wrong, as to (A) Summary Judgment and (B) Immunity Doctrine, Under the Facts of This Case.

(A) SUMMARY JUDGMENT

"The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion." *Surowitz* v. *Hilton Hotels Corp.* 383 U. S. 363, 372.

Two basic factors were ignored by the lower courts that clearly prevented the entry of summary judgment in this case, namely, the insuficiency of the affidavit in support of the respondents motion and the presence of genuine issues of material facts.

The affidavit of Captain Palkovic (R. Vol. I 21) was not based upon "personal knowledge" nor did it show that "affiant is competent to testify to the matters stated" in the affidavit, clearly in violation of the Federal Rules[1] and as stated by the courts:

> "When affidavits are offered in support of a motion for summary judgment, they must present admissible evidence and not only be made on personal knowledge of the affiant but must show the affiant possesses the knowledge asserted." *Sprague* v. *Vogt,* (C. A. 8th. 1945), 150 F. 2d 795, 800.

A reading of the Palkovic affidavit clearly shows that it is filled with conclusionary statements that are self serving and full of inadmissible evidence when it states: "That no requirement exists that a performance evaluation not be made on these occasions; that the manual does permit such special evaluations and the practice on board the USS Robert A. Owens has been and continues to be to make such evaluations on occasions of detachments of enlisted men in the rates of petty officer second class and above; that there is no requirement in the Manual that semi-annual evaluations not be made on such occasions; that the evaluation of February 2, 1967, was made in the normal course of the official

[1]Rule 56(e) F. R. C. P. states: "Supporting . . . affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein."

duties of LCDR H. E. Miniter, Jr., and were made with the requirement that such evaluations be made by Section C-7821(3) of the Bureau of Naval Personnel Manual."

It is more than evident that the Palkovic affidavit is insufficient by its silence. It is silent as to how long continued has been this alleged practice; has it been certain and uniform; was it compulsory; was it consistent; was it general throughout the Navy; was it known and was it in opposition to the terms and provisions of a lawful order or regulation?

The language of the instruction of the Bureau of Naval Personnel Manual in regards to transfers and evaluation is explicit, clear and mandatory:

> "On transfer for permanent change of station or completion of temporary duty/temporary additional duty *if 90 or more days of the current reporting period have elapsed.*" Section C-7821-(8)(b)(1) (Emphasis added)

As previously stated, not only are the statements complained of false, defamatory and deliberately made, but the facts clearly show that petitioner had not had 90 days elapse of his current reporting period on February 2, 1967, and furthermore, he was only on the ship six (6) days of this period, as the ship left the United States on January 10, 1967 and petitioner stayed in the United States on leave.

Not only were the respondents prevented by the above section of the Manual, but the manual itself is precluded from granting the respondents any authority other than that explicitly granted to them by the Manual itself under the authority of the U. S. Navy Regulations so

long as the Manual does not conflict with the Regulations.[2]

The Navy Regulations having the "force of statute law", *Cafeteria Workers* v. *McElroy*, 367 U. S. 886,891, the respondents are precluded from asserting any alleged "practice"[3] but are confined to strict compliance with said Regulations, while the instructions of the Manual are for guidance in the performance of matters as per-

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[2]"The information and instructions contained in this Manual are issued for the guidance of personnel in matters under the cognizance of the Chief of Naval Personnel. They have the same force and effect as orders issued by the Chief of Naval Personnel, *but they in no way alter or amend any provision of U. S. Navy Regulations, 1948* . . ." (R. Vol. I. 22) (Emphasis added) "The regulations, orders, and instructions issued for the guidance of all persons in the Department of the Navy are found in the following sources: (a) 'United States Navy Regulations' issued by the Secretary of the Navy and approved by the President . . . (f) Manuals and similar publications, including those within the Navy and Marine Corps Directives Systems, issued by the chiefs of bureaus and offices, the Comptroller of the Navy, the Judge Advocate General, and the Commandant of the Marine Corps, and approved by the Secretary of the Navy." *Article 1201(1) U. S. Navy Regulations.* "The regulations, orders, and instructions contained in the said sources are binding on all persons in the Department of the Navy. *No regulation, order, or instruction shall be issued by any chief of bureau or office,* the Comptroller of the Navy, the Judge Advocate General, the Commandant of the Marine Corps, *or other officer or official which conflicts with, alters or amends any provision of the above listed sources. . . .*" *Article 1201(2), U. S. Navy Regulations.* (Emphasis added)

"The scope of the principal regulation publications is as follows: (1) United States Navy Regulations,—Principles for the guidance of the Department of the Navy as to the duty, responsibility, authority, distinctions, and relations of the various bureaus, officials, and individuals each to the other . . . (7) Manuals and similar publications.—Detailed instructions and information which pertain to matters under control of the issuing authority." *Article 1202, U. S. Navy Regulations.*

"Every officer in the naval service shall acquaint himself with, obey and so far as his authority extends, enforce the laws, regulations, and orders relating to the Naval Establishment." *Article 1209 U. S. Navy Regulations.*

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[3]Roget's Thesaurus of Words and Phrases, Revised and Authorized American Edition, Section 613, lists "practice" and "custom" as synonyms of "habit".

tains to the Chief of Naval Personnel. Thusly, all acts within and under the cognizance of the Chief of Naval Personnel must be performed in accordance with the "explicit authorization" of the Manual. There can be no "inferred authorization" when the Manual is silent nor can there be any departure from the instructions of the Manual if such departure will conflict with the provisions of the Regulations. Cf. *Greene* v. *McElroy* 360 U. S. 474, *Service* v. *Dulles,* 354 U. S. 363, *Williams* v. *Zuckert,* 371 U. S. 535, on rehearing, 372 U. S. 765, *Vitarelli* v. *Seaton.* 359 U.S. 535. Moreover, the prohibition against such "practice" has been in the annuals of the Navy since 1937,[4] and was and is included in the Manual for Court-Martials, 1951, Section 213(b), page 382, "There can be no such thing as custom that is contrary to existing law or regulation."

Thusly, the contention of the respondents, that because the Manual states "Special evaluations may be made at any time when the individual's performance indicates that special cognizance should be taken of an outstanding occurrence, either meritorious or derogatory, and Commanding officers may make memorandum entries on page 9 for any reason which they consider appropriate" is a genuine issue of material fact that precludes the entry of summary judgment in favor of the respondents, the petitioner having contended that the Manual prevents the evaluation marks complained of, as the records in the case at bar, show that between December 17, 1966 and February 2, 1967, there were no derogatory entries in the petitioner's service record (R. Vol. I. 9)

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[4]"The fact that such usages exist, therefore, can never be pleaded in justification of conduct otherwise criminal or reprehensible nor relied upon as a complete defense in a trial by court-martial." *Naval Courts and Boards, 1937,* Section 5(d) page 3.

and that the use of the "calculated falsehood" and "malicious libel" which enjoy no constitutional protection, cannot by any stretch of the imagination be considered "appropriate reasons". Cf. *Time* v. *Hill,* 385 U. S. 374, 389-390, *New York Times Co.,* v. *Sullivan,* 376 U. S. 254, 279-280, *Garrison* v. *Louisiana,* 379 U. S. 64, and concurring opinion of Mr. Justice Stewart in *Rosenblatt* v. *Baer,* 383 U. S. 75, 92.

Moreover, this contention of the respondents was not made a part of the motion in the lower court, they having asserted it for the first time in their brief in the Court of Appeals, nor was it asserted as a basis for the immunity doctrine in the affidavit of Captain Palkovic.

Thusly, summary judgment was precluded in the case at bar, because there were genuine issues as to material facts, whether or not the respondents wrote in the exercise of official responsibility; whether or not they went outside their line of duty; whether or not they went outside the limits of their authority; whether or not they wrote in the course of their duties and in the discharge of their duties; whether or not they were acting within the scope of their powers; whether or not the occasion was one which would have justified their act and whether or not the Navy Regulations took precedence over the instructions of Bureau of Naval Personnel Manual.

(B) IMMUNITY DOCTRINE

The undisputed facts clearly show that the respondents should not have been granted absolute immunity as contemplated by Barr v. Matteo.

The respondents' powers, duties and functions as

set forth in the U. S. Navy Regulations[5] were that they were to explicitly follow the orders of their superiors, COMCRUDESLANT, of January 21, 1967 (R. Vol. I. 34). They were to forward petitioner's orders and records to the Naval Station and nothing more. They had neither the power nor authority to go beyond the dictates of those orders as contained in the radio message. As of that date, their jurisdiction over the petitioner[6] ceased and anything they did thereafter was not germane to the orders they had received.

Moreover, respondents can cite no rule, regulation or order that is the basis for their authority to make any recommendation concerning the petitioner's reenlistment, nor have they ever asserted in their pleadings, affidavits or exhibits that they had the jurisdiction or authority to make the recommendation that is part of the subject matter of this case.

Thusly, it is abundantly clear that the statements, not only false, malicious, defamatory and deliberately made by the respondents, were also gratuitous and irrelevant to the subject matter, and beyond their authority and jurisdiction and immunity is not available to them.[7]

A naval officer who makes a defamatory report on a subordinate based upon false facts and malicious libel

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[5]"All persons in the naval service are required to obey readily and strictly, and to execute promptly, the lawful orders of their superiors." *Article 1211(1), U. S. Navy Regulations.*

[6]Physical jurisdiction was lost on January 9, 1967, when the Owens went to the Mediterranean Sea and petitioner stayed in the United States.

[7]"Those exceptions are (1) action by officers beyond their statutory powers and (2) even though within the scope of their authority, the powers themselves or the manner in which they are exercised are constitutionally void." *Dugan* v. *Rank*, 372 U. S. 609, 621, citing *Malone* v. *Bowdoin*, 369 U. S. 643, at 647.

cannot be considered as acting within the scope of official authority and responsibility. He is on notice that he is acting out of the ordinary, and is responsible.[8]

> "While no act can ever be judged in vacuo, but only with some measure of reference to external circumstances, some actions require very little showing in order to appear at least prima facie justified, while others need elaborate support. Paradoxically it would seem that it is in the latter situation that there is less need for the immunity doctrine. In the latter case, where an officer knows that he is acting out of the ordinary, he is on notice of the circumstances, and there is more reason for him to have to expect to be prepared to justify his conduct."

> "However, I see no reason why the innocent should not have direct protection as well as the

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[8]"A commanding officer who departs from his orders or instructions, or takes official action which is not in accordance with such orders or instructions, does so upon his own responsibility and shall report immediately the circumstances to the officer from whom the prior orders or instructions were received." *Article 0701(2) U. S. Navy Regulations.*

Mr. Justice Brennan, in his dissenting opinion in *Wheeldin* v. *Wheeler*, 373 U. S. 647, stated that the doctrine of Barr v. Matteo did not apply to cases such as the case at bar: "In that case we upheld the governmental officer immunity in respect of 'action taken . . . within the petitioner's line of duty'. (360 U. S. at 575). It has never been suggested that the immunity reaches beyond that perimeter so as to shield a federal officer acting wholly on his own. A federal officer remains liable for acts committed 'manifestly or palpably beyond his authority'."

See also *Fowler* v. *Southern Bell Telephone and Telegraph Co.*, 343 F. 2d. 150 (C. A. 5th. 1965), opinion by Circuit Judge Bell, in regards to acts of a public official beyond his authority and power wherein special investigators of the Alcohol and Tobacco Tax Division were charged with wire tapping. There the Court stated, "The defense should not be sustained on the basis of technical procedural defaults of the opposing party or in the absence of a clear and factual demonstration that the actions of the officers were indeed taken in pursuit of their official duties." (343 F. 2d at 155).

guilty by the only means available to them, that is, by an action against the officer responsible for the wrong." Kelly v. Dunne, (C. A. 1st. 1965) 344 F. 2d. 129, 134.

There are many cases in the books where actions have been sustained not only against governmental officers, but also against officers of the armed forces.

Consideration of a few of them would seem depositive here of any contention that the false, malicious, defamatory report of February 2, 1967, issued without authority, was in any way immunized.

In *Wilson* v. *MacKenzie,* 7 Hill 95, 42 Am. Dec. 51, an action for assault by a seaman against his commanding officer which occurred on the high seas, the superior defendant defended upon the grounds that his acts were pursuant to his authority as commanding officer of the ship. The court held that the seaman was entitled to judgment, and in an opinion by Nelson, C. J., he commented upon *Sutton* v. *Johnstone,* 1 T. R. 492, 99 English Reprint 1215 (1786) and upon the reasons for its reversal. The reasons are set forth in *Warden* v. *Bailey,* 4 Taunt. 67, 88-89, 12 English Reprint 253, 261, also cited in *Wilson* v. *MacKenzie,* supra.

In *Warden* v. *Bailey,* supra, an action for trespass was held to lie for an inferior officer against his superior officer, both in actual military service, who imprisons him for disobedience to an order made under color, but not within the scope of military authority, and in upholding this cause of action stated in regard to *Sutton* v. *Johnstone,* supra, as follows:

"The learned Judge was desired to nonsuit the

plaintiff upon the ground of doctrine, supposed to be established by the case of Sutton v. Johnstone, that an inferior officer cannot maintain an action against a superior officer for imprisonment inflicted in consequence of disobedience to any command whatsoever, issued by the superior to the inferior officer. To be sure, this is a very wide inference to draw from Sutton v. Johnstone, that being only a case of imprisonment for disobedience to orders issued in the heat of battle, where obedience, and instant obedience is necessary. Lord Mansfield and Lord Loughborough do not decide this point; they expressly avoid determining it, though they intimate a very strong opinion, and send it to the dernier resort. *The only point therefore decided in Sutton* v. *Johnstone, is, that there was probable cause for imprisonment, in that case.*" (4 Taunt. 88-89, 12 Eng. Rep. 261) (Emphasis added)

The opinion of *Wilson* v. *MacKenzie,* supra, refers to the argument in *Warden* v. *Bailey,* supra, and the statement of Lawrence, J., to the effect, that he "had heard from good private information that the reasons assigned by Ld. Mansfield for reversing the judgment of the Court of Exchequer Chamber were not adopted by the House of Lords, though the judgment of the Chief Justices was affirmed. (4 Taunt. 74)

Wall v. *M'Namara,* cited in 1 TR 536, 537, and in *Wilson* v. *MacKenzie,* supra, was an action brought by a captain in the African Corps, against the Lieutenant Governor of Senegambia for imprisoning him for nine months under circumstances of cruelty. Lord Mansfield in his summation to the jury said:

> "In trying the legality of acts done by military officers in the exercise of their duty, particularly beyond the seas, where cases may occur without the possibility of application for proper advice, great latitude ought to be allowed, and they ought not to suffer for a slip of form, if their intentions appear to have been upright: . . . But on the other hand, if the heart is wrong, if cruelty, malice and oppression, appear to have occasioned or aggravated the imprisonment or other injury complained of, *they shall not cover themselves with a thin veil of legal forms, nor escape, under a cover of justification, the most technically regular, from that punishment which it is your province and your duty to inflict in so scandalous an abuse of public trust.*" (Emphasis added)

The verdict was for the plaintiff and likewise in the case of *Hannaford* v. *Hunn,* 2 Carr. & P. 148, 172 English Reprint 68 (1825), which was an action for false imprisonment brought by a master of a man of war against his captain, in which *Wall* v. *M'Namara,* supra, is cited in a foot note to the case. (Compare *Mostyn* v. *Fabregas,* 1 Cow 161, 98 English Reprint 1021, a native against the Governor of Minorca, verdict for the plaintiff affirmed on appeal, 2 Black, W. 929, 96 English Reprint 549).

Thus, the English cases have followed the rule that where (1) the acts were illegal for want of jurisdiction or authority, and (2) the acts were illegal by reason of their being only colorable, and for some improper purpose, and not really in the exercise of military authority, but malicious and without even probable cause, actions would lie, verdicts would be upheld and the doctrine of immunity rejected.

In *Mallory* v. *Merritt,* (1845), 17 Conn. 178, the court followed these principles, which was an action for trespass vi et armis against a captain of militia for allegedly unlawfully imprisoning a private. The captain demurred to the declaration claiming that the fine imposed by him upon the private was for neglect of duty and that the imprisonment was for the collection of the debt. The Court held that the demurrer should be overruled (giving judgment for plaintiff), and said in part:

> "The issuing of the warrant, therefore by the defendant, was unauthorized by law, and affords him no justification for the injury complained of by the plaintiff." (17 Conn. 180)

In *Dinsman* v. *Wilkes,* (1851) 12 How. (53 U. S.) 390, this Court, in an opinion by Chief Justice Taney, stated principles on equal par with the instructions of Lord Mansfield in *Wall* v. *M'Namara,* supra.

> "But at the same time it must be borne in mind that the nation would be equally dishonored, if it permitted the humblest individual in its service to be oppressed and injured by his commanding officer, from malice, or ill will, or the wantonness of power, without giving him redress in the courts of justice." (12 How. at 402)

.....

> "And if, from malice to an individual, or vindictive feeling, or a disposition to oppress, he inflicted punishment beyond that which, in his sober judgment, he would have thought necessary, he is liable to this action." (12 How. at 404)

.....

> "This is not a case where the punishment alleged to have been inflicted was forbidden by law, or beyond the power which the law confided to him. *For, in such a case, he would be liable whatever were his motives.*" (12 How. at 404) (Emphasis added).

The Chief Justice further held that the entire case turned upon the motive of the defendant and that this question was one exclusively for the jury, to be decided by them upon the whole testimony. (12 How. at 404)

Nixon v. *Reeves,* (1896), 65 Minn. 159, 67 N. W. 989, was an action for damages by a member of the Minnesota National Guard against one of his company officers. The jury rendered a verdict for the plaintiff and in affirming it on appeal the State Supreme Court stated:

> "On the contrary, he seems to have acted upon the mistaken theory that he was authorized to punish a disobedience of his orders summarily, and at his discretion. In this he was mistaken. He should have proceeded against the plaintiff before a court-martial or a justice of the peace, or both. It is urged that this construction of the statute is destructible of military discipline. Of this it is not our province to judge, but if such be the case the remedy is with the legislature."

Our Supreme Court in an analogous situation in *Wilkes* v. *Dinsman,* 7 How. 89, 12 L. ed. 618, concluded:

> "It is not to be lost sight of, however, and will be explained more fully hereafter, that, while the chief agent of the government, in so important a

trust, when conducting with skill, fidelity, and energy, is to be protected under mere errors of judgment in the discharge of his duties. *Yet he is not to be shielded from responsibility if he acts out of his authority or jurisdiction, or inflicts private injury either from malice, cruelty, or any species of oppression,* founded on considerations independent of public ends. *The humblest seaman or marine is to be sheltered under the aegis of the law from any real wrong, as well as the highest in office."* (Emphasis added)

From these cases have evolved the general rule well stated in 6 *C. J. S., Army and Navy,* Section 36(a), p. 419:

"A person in the military service has his civil remedies for any abuse of authority by his military superiors. Thus, actions have been brought by persons in the military service against their superiors, and persons acting under their direction for various causes. An officer is not answerable for an injury done within the scope of his authority, *unless influenced by malice, corruption, or cruelty,* although he may have committed an error of judgment in the exercise of his discretionary authority." (Emphasis added)

In some cases, the executive arm of the government, overcome by compassion for the criminal, liberates him, at the risk of sacrificing the public good. Is the judiciary now to become overcome by compassion for naval officers at the risk of sacrificing the enlisted men of the service?

It is time to return to the oldfashioned philosophy that each person is responsible for his own conduct and that evil and thoughtless officers must be judicially restrained from harming others. And, if their conduct (officers) does not measure up to the minimum standards set by society for its protection then he must be held accountable to the party he has injured. It is time to revive the principles of self discipline and individual responsibility and make them again the mainspring of our system of government and laws.

We have experimented long enough with the idea that it (immunity doctrine) is for the good of society. It has brought nothing. It is time to turn things around. It is highly dangerous and contrary to the most fundamental principles of a free government to put it (Immunity) within the power of thoughtless and evil officers, as concluded by Mr. Montesquieu, the French writer in his "The Spirit of The Laws" when he stated, "Men entrusted with power tend to abuse it".

No greater danger to an effective service by enlisted men, who constituted the "back bone" of the military establishment, exists, than the concept that a man in uniform, simply by virtue of his position in the military establishment, is outside the sanctuary of the constitution, and that officers are immune to the prohibitions of the law merely because they are officers. Such a concept is at war with the first principles of a government predicated upon the assumption that no man, no matter how high his position, stands wholly above the law. (Cf. *Marbury* v. *Madison,* 1 Cranch 137, 163-168).

CONCLUSION

This Court is the judicial bulwark against tyranny and injustice on the part of any one individual, groups or segments of the government, and petitioner now asks this Court to grant to him that access to the courts and judicial relief referred to by this Court in *Harmon* v. *Brucker,* 355 U. S. 579.581, wherein the Court held that judicial relief was available and would be granted to one who had been injured by an act of a government official which was in excess of his express or implied powers and further concluded that it was late in the day to argue that everything that the executives of the armed forces did in connection with their subordinates was not beyond the reach of judicial scrutiny. Cf. *Clackum* v. *United States,* 296 F. 2d. 226. 228.

For these and all the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

(Filed November 6, 1967)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

ROBERT M. PAGANO,	)	
	)	
Plaintiff	)	
	)	Civil Action
v.	)	No. 6203
	)	
SAMUEL A. MARTIN and	)	
HOWARD E. MINITER, JR.,	)	
	)	
Defendants.	)	

MEMORANDUM ORDER

Plaintiff here seeks damages from the defendants for alleged published malicious libelous writings. Defendants claim privilege.

THE FACTS

Plaintiff and defendants are members of the United States Navy and attached to the USS ROBERT A. OWENS (DD 827). Pagano is a radarman with the rank of E-6, a First Class Petty Officer, and is 01 division leading petty officer. Martin holds the rank of Commander and was Commanding Officer of said ship. Miniter, who holds the rank of Lieutenant Commander was its Executive Officer. Pagano had practiced his profession of radarman in the Navy for 9½ years. He has an excellent reputation in his profession, attained by his

conduct, industry and ability. He had planned to make the Navy a career.

On December 16, 1966, Pagano was rated by the Executive Officer, Miniter, for the semi-annual period. It was a good rating. The report said:

> "Pagano has shown himself to be a competent radarman and an excellent petty officer by his extremely effective and reliable professional performance. He expresses himself well and with authority."

Among other things, the report said of Pagano that he "promotes good morale", "gets the most out of his men", "works well on his own", "willingly follows commands and regulations".

On or about December 16, 1966, Pagano went on ten days annual leave, to return January 7, 1967. He requested and received ten days emergency leave from January 9, to January 20, 1967, because his wife was "being operated on". On January 17, 1967, a Naval Message was sent from Naval Station at Norfolk to the USS ROBERT A. OWENS, advising that Pagano's wife was still in the hospital and requesting ten days extension of the emergency leave. The message set out that orders were aboard the ship for his transfer in March as a school instructor to San Diego. The message suggested that Pagano not be returned to the ship, but assigned to the Naval Station at Norfolk to save the cost of transportation. After some controversy this was done. Hence, it appears that after December 16, 1966, Pagano was only attached to the USS ROBERT A. OWENS for ten days (December 16, 1966 to December 27, 1966), nor was he

under the observation of either of the defendants after that time.

On February 2, 1967, a rating report was filed by Miniter covering the period of December 17, 1966 to February 2, 1967, together with certain recommendations. This report and recommendations are the basis of this action. The report said that Pagano "quite often failed to demonstrate the qualities of leadership expected of a first class petty officer—he aired his complaints about this command's policies in front of his subordinates whenever he felt he had been treated unfairly—too often he diverted his efforts toward getting his own way—he broke the chain of command to register a complaint—he raised undue objections to orders given him—his professional performance attitude and capabilities were extremely marginal and in general of the E-4 level. His attitude was in general bad for morale. He is not recommended for reenlistment in the future." On December 9, 1966, Miniter, by direction of Martin, had stated in the record of Pagano:

> "Recommended for advancement and nominated for examination. Eligible in all respects for participation in Navy-wide competitive examination for R D C."

On February 2, 1967, this recommendation was withdrawn. He was assigned a low mark in Leadership and Supervisory Ability, and in Adaptability.

Pagano says his Navy Career is now at an end; that the performance report filed by defendants on February 2nd was false and malicious, and with intent to damage and injure plaintiff; that defendants were not required

or even authorized to file this report; that there was no basis for the report; that on December 16, 1966, defendants had given plaintiff a good report, and had only six days thereafter to observe him in the performance of his duties; that defendants became angry and displeased when plaintiff requested an extension of his emergency leave, which had the effect of relieving him from duty aboard their ship.

Plaintiff says the alleged malicious report was beyond the duty and power vested in defendants by the Rules and Regulations governing the rating and report on personnel under their command; he says that pursuant to the Bureau of Naval Personnel Manual C-7821, these defendants were not authorized to make such a report because 90 days had not elapsed since the previous report. Defendants' immediate superior officer says that the Navy Manual does not prohibit a report being made more frequently than each six months, and that the report was made in the normal course of the official duties of the defendants, as was customary on that ship.

A copy of the provisions of Chapter 7 (C-7821) of Bureau of Naval Personnel Manual, Revised 1959, is attached to the papers in this cause, and made a part of this opinion. It will be noted from this Manual that it prescribes that reports shall be made at specified periods, and that under paragraph (8) (b) (4), that a "Special evaluation may also be made at any time when the individual's performance indicates that special cognizance should be taken of an outstanding occurrence, either meritorious or derogatory." In any event, there is nothing in the Manual which prohibits an officer from making other reports.

Defendants filed a motion to dismiss for alleged failure to state a cause of action because defendants were acting within the scope of their employment and the reports complained of were made in the normal course of these duties. This motion is treated as a motion for summary judgment.

Defendants' contention is that the making of the report in question and the ratings issued are absolute privilege. That is, that the statements were in the discharge of defendants' official duties and in relation to matters which they had the right and duty to report upon. There is no doubt defendants were Federal Officers. *Howard* v. *Lyons,* 360 U.S. 593, *Denman* v. *White,* 316 F. 2d 524 (1st Cir. 1963). The authority for a Federal Officer to act derives from federal sources and the federal courts in such cases are not bound to follow state law. *Howard* v. *Lyons,* supra.

Individual officers of the United States Navy who, in the discharge of their official duties, report of and concerning persons under their command, are and should be protected by an absolute privilege from personal liability in defamation actions. The United States Supreme Court held in *Barr* v. *Matteo,* 360 U.S. 564 and *Howard* v. *Lyons,* 360 U.S. 593, that individual officers of the United States Government who issued public statements in the discharge of their official duties were prohibited by an absolute privilege from personal liability in defamation actions. Among the reasons for the privilege it was said officials of government should be free to exercise their duties without fear of damage suits for acts done. It quoted from the excellent opinion of Judge Learned Hand in *Gregoire* v. *Biddle,* 177 F. 2d 579, wherein, among other things, he said:

"It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. . . .

The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his pow-

ers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him . . ."

The privilege is an expression of a policy designed to aid in the effective functioning of government. It is not the title to the office which is protected, but the performance of the duties entrusted to the officer.

The mere fact that the defendants were not required by the Navy Regulations to make the report does not destroy the privilege. They had the power and authority to make the report. This is covered in the opinion of *Barr* v. *Matteo,* 360 U.S. 564, at 575 where the Court said:

"That petitioner was not required by law or by direction of his superiors to speak out cannot be controlling in the case of an official of policy-making rank, for the same considerations which underlie the recognition of the privilege as to acts done in connection with a mandatory duty apply with equal force to discretionary acts at those levels of government where the concept of duty encompasses the sound exercise of discretionary authority.

The fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable, despite the allegations of malice in the complaint, for as this Court has said of legislative privilege:

> 'The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.' Tenney v. Brandhove, 341 U.S. 367, 377."

In *Preble* v. *Johnson,* 275 F. 2d 275 (10th Cir. 1960), the Court said that statements which are not authorized by or in furtherance of some rule or regulation may be in line of official duty, and if deemed appropriate to the exercise of utterer's office or station, are privilege. See also *Brownfield* v. *Landon,* 307 F. 2d 389 (1962 D. C. Cir.).

We deal with the relation between the acts complained of and the matters committed to the supervision and determination of the defendants. They are not bound by a "rigid scope of duty", but are entitled to a more liberal and generalized concept of line of duty.

There are doubtless instances of actual injustices which will go unredressed, but this must be weighed against the whole. The law is not perfect. It is the good

of the great majority which must be protected. Some must suffer for the good of the masses. Although the reports in this case appear harsh, without much outward foundation, and far-reaching, it would almost destroy the system of rating inferior rank personnel by the higher rank if the person were denied the right to express his opinions freely. If there is to be any further restriction in this field, it should be imposed by Congress. If an officer is to answer for such opinions as are expressed in this case, it should be by direction of Congress or by Rules and Regulations promulgated by authority of Congress.

The statements made were absolute privilege, and the motion for summary judgment is granted, and the Clerk is ORDERED to enter the same.

/s/RICHARD B. KELLAM
United States District Judge

Norfolk, Virginia.
November 6, 1967.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12,234

ROBERT M. FAGANO,

Appellant,

versus

SAMUEL A. MARTIN and
HOWARD E. MINITER, Jr.,

Appellees

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk, Richard B. Kellam, District Judge.

Argued June 19, 1968. Decided July 1, 1968.

Before Bryan, Winter and Craven, Circuit Judges.

Robert M. Harcourt for Appellant, and Walter H. Fleischer, Attorney, Department of Justice, (Edwin L. Weisl, Jr., Assistant Attorney General, John C. Eldridge. Attorney, Department of Justice, and C. Vernon Spratley, United States Attorney, on brief) for Appellees.

PER CURIAM:

In this libel action, Robert M. Pagano, a Radarman First Class in the United States Navy, claims damages from his superior officers, Commander Samuel A. Martin and Lieutenant-Commander Howard E. Miniter, Jr., who were respectively the commanding officer and executive officer of the USS Robert A. Owens, the plaintiff's ship. The alleged defamation appears in a Report of Enlisted Performance Evaluation issued on February 2, 1967 by the defendants upon Pagano's detachment from the Owens. In substance it downgraded him sharply and recommended he not be reenlisted in the future. Dismissal of the complaint was ordered by the District Court on defendants' motion for summary judgment, and Pagano appeals.

We affirm. The report, authorized by the Bureau of Naval Personnel Manual, was made by the defendant officers as part of their official duties. With the trial court, we think the suit, as a matter of law, cannot be maintained. Barr v. Matteo, 360 US 564 (1959); Feres v. US, 34 US 135 (1950).

AFFIRMED.